Supreme Court, U.S.
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No. 08-519

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In The
Supreme Court of the United States

RANDY ROBERTS,

Petitioner,

v.

JEFF HAGENER, Director, Montana Department of Fish, Wildlife and Parks; VICTOR WORKMAN, TIM MULLIGAN, STEVE DOHERTY, JOHN BRENDEN, and SHANE COLTON, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; MONTANA FISH, WILDLIFE AND PARKS COMMISSION; BRIAN A. SCHWEITZER, Governor, State of Montana; and the STATE OF MONTANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, notwithstanding the decision of this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), the Fourteenth Amendment's Equal Protection Clause requires that strict judicial scrutiny be applied to any legislation or regulation of a State or its political subdivisions that treats American Indians or American Indian tribal members either preferentially or discriminatorily, without express delegation of such authority from Congress?

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all the parties. Petitioner Roberts is an individual and not a corporation. Therefore, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Randy Roberts hereby petitions this Court for a writ of certiorari to review the opinion of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The U.S. District Court for the District of Montana granted the State of Montana's Rule 12(b)(6) Motion to Dismiss for failure to state a claim on which relief can be granted and converted the motion to one for summary judgment. *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) (App. 4). The District Court then entered summary judgment for Montana, dismissing Mr. Roberts' claims. *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Feb. 2, 2007) (App. 18). Mr. Roberts appealed and the Ninth Circuit affirmed the District Court's decision. *Roberts v. Hagener*, No. 07-35197, slip op. (9th Cir. July 18, 2008) (App. 1).

JURISDICTION

The District Court had jurisdiction over Roberts' claims pursuant to 28 U.S.C. § 1331. The Ninth Circuit had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. Pursuant to Supreme Court Rule 13, Mr. Roberts filed this Petition timely, that is, within 90 days of the entry of

final judgment, thereby invoking the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The Congress shall have the Power . . . To regulate Commerce . . . with the Indian Tribes; . . .

U.S. Const. art. I, sec. 8, cl. 3, The Indian Commerce Clause (App. 23).

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .

U.S. Const. art. II, sec. 2, cl. 2, The Treaty Clause (App. 23).

> [N]or [shall any State] deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, sec. 1, The Equal Protection Clause (App. 23).

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction; and all persons who are descendents of such members who were, on June 1, 1934 residing with the present boundaries of any Indian reservation;

> and shall further include all other persons of one-half or more Indian blood. For purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Section 19 of the Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (now codified as 25 U.S.C. § 479) (App. 24).

> An Indian has preference in appointment in the Bureau [of Indian Affairs]. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an Indian he shall be given preference in filling the vacancy. . . .

44 BIA Manual 335, 3.1 (1974) (App. 24-25).

> For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs, a preference will be extended to persons of Indian descent who are:
>
> (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
>
> (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

> (c) All others of one-half or more Indian blood of tribes indigenous to the United States;

25 C.F.R. § 5.1 (43 FR 2393, Jan. 17, 1978; replacing 44 BIA Manual 335, 3.1) (App. 25).

> Only tribal members are allowed to hunt big game on Indian Reservations, unless otherwise provided for by agreements between the State of Montana and Tribal Government.

Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at http://fwp.mt.gov/hunting/regulations.html (App. 23-24).[1]

STATEMENT OF THE CASE

There are seven Indian reservations within the State of Montana. Montana has in place now, as it has for more than 40 years, a hunting regulation that provides, "only [Indian] tribal members are allowed to hunt big game on Indian Reservations. . . ."[2] Included in the description of "Indian Reservations" are non-Indian-owned fee lands – allotted pursuant to the General Allotment Act – that lie within the exterior

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[1] The subject of Roberts' suit was the 2005 Montana regulation, which is identical to the 2008 regulation. The regulation defines neither "tribal members" nor "Indian Reservations."

[2] Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at http://fwp.mt.gov/hunting/regulations.html (App. 23-24).

boundaries of Indian reservations. As a result, any Indian tribal member in the United States may hunt big game on non-Indian-owned fee lands within any of Montana's Indian reservations, but the non-Indian owners of that land may not hunt big game there and may not grant permission to other non-Indians to hunt there.

Randy Roberts' mother, a non-Indian and non-tribal member, owns allotted fee land on the Crow Reservation in Montana. Randy Roberts, also neither an Indian nor a tribal member, desires to hunt big game on his mother's fee land but may not do so because of Montana's hunting regulation.

Mr. Roberts filed suit in Montana federal District Court alleging that Montana's hunting regulation of non-Indian-owned fee lands within Montana Indian reservations preferred all Indian tribal members in the United States to him, thus violating his right to equal protection of the law under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[3] He also alleged that this odious classification requires the court to apply "strict scrutiny" in determining its constitutionality. Nevertheless, in response to the State of Montana's Motion to Dismiss, the District Court held that the proper standard of judicial review was "rational basis" because the term "tribal members" was a political classification not based on race, national origin,

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[3] U.S. Const. amend. XIV, sec. 1 (App. 23).

ancestry, bloodline or descent, despite that tribal membership requires proof of such immutable characteristics.[4] In so ruling, the District Court relied upon this Court's decision in *Morton v. Mancari*.[5]

The District Court then converted Montana's Motion to Dismiss to one for summary judgment[6] and addressed whether Montana possessed a rational basis for the classification contained in its hunting regulation. The District Court ruled in favor of Montana, holding that the regulation – allowing only American Indian tribal members throughout the United States to hunt on non-Indian-owned fee lands within Montana Indian reservations, including land owned by Mr. Roberts' mother – met the rational basis test and was constitutional.[7]

Subsequently, the Ninth Circuit, without the requested oral argument, in an unpublished two-page Memorandum Opinion, affirmed the District Court's holding.[8] Relying solely on the political-racial distinction in *Mancari*, the Ninth Circuit declared that Montana's hunting preference for all "tribal members" in

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[4] *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) (App. 4).

[5] 417 U.S. 535 (1974).

[6] *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) (App. 4).

[7] *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Feb. 2, 2007) (App. 18).

[8] *Roberts v. Hagener*, No. 07-35197, slip op. (9th Cir. July 18, 2008) (App. 1).

the United States was a political, not racial, classification, subject only to rational basis scrutiny. In fact, the Ninth Circuit did not even discuss the foundational core of this Court's holding in *Mancari* – that Congress's constitutional and plenary powers and its historical and unique trust relationship with American Indian tribes are the sources of Congress's powers to deal with American Indians specially. Nor did the Ninth Circuit discuss whether States have either these powers or this relationship or whether Congress has delegated any such powers to the States.

REASONS FOR GRANTING THE PETITION

I. *MANCARI*'S POLITICAL-RACIAL DISTINCTION IS A SAFE HARBOR FOR RACE-BASED ACTS BY STATES AND THEIR SUBDIVISIONS.

A. *MANCARI*'S POLITICAL-RACIAL DISTINCTION HAS BEEN WRONGLY INTERPRETED AS THE CORE OF *MANCARI*.

Since 1974, this Court's decision in *Morton v. Mancari*[9] has served as the basis for equal protection review by federal courts of State legislation that prefers Indian tribal members to non-Indians, including the Ninth Circuit here. Unfortunately, the "political-racial" distinction of *Mancari* has caused grievous

[9] 417 U.S. 535 (1974).

misunderstanding of and gross confusion over the foundational core of *Mancari*.

The finding of *Mancari* that Congress may sometimes deal specially with American Indians is grounded, foremost and fundamentally, in Congress's extra-constitutional plenary power over Indian tribes, the Constitution's Indian Commerce Clause,[10] and Congress's historical and special trust relationship with Indian tribes. Over time, these elements may arguably have created a quasi-political relationship between the federal government and tribal members, which may explain *Mancari*'s use, albeit unnecessarily, of the political/racial distinction. Unfortunately, federal courts have ignored that States, unlike Congress, have no plenary power over, no constitutional powers concerning, and no special trust relationship with Indian tribes. Instead, federal courts have focused wrongly on *Mancari*'s political-racial distinction. The result is holdings, like that of the Ninth Circuit here, that State legislation or regulation preferring or discriminating against tribal members is subject to rational basis review.

Mr. Roberts presents this Court with an opportunity to make explicit that the political-racial distinction employed in *Mancari* is not the basis for this Court's holding there, that *Mancari* has no application at all to the actions of States or their political subdivisions, and that the 34-year history of using

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[10] U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

Mancari to sustain racial preferences by States must end.

B. *MANCARI* IS GROUNDED IN CONGRESS'S PLENARY POWER OVER INDIANS AND ITS UNIQUE RELATIONSHIP WITH THEM.

Mancari is grounded in: (1) the plenary power of Congress over Indian tribes, derived from the Indian Commerce Clause[11] as well as extra-constitutional considerations; and (2) the unique status of Indian tribes and their relationship to the United States, derived from historical relationships and a series of treaties pursuant to the Treaty Clause,[12] all of which place Congress in a guardian-ward status as to Indian tribes and their members. Therefore, under *Mancari*, whether federal legislation preferring Indians over non-Indians is "political" or "racial" is irrelevant. Moreover, even if possibly relevant for acts of Congress, such a distinction is not relevant at all to actions by States or their political subdivisions.

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[11] U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

[12] U.S. Const. art. II, sec. 2, cl. 2 (App. 23).

1. *Mancari*'s Holding, as to Congress and Its Powers, Is Grounded in History and the Constitution.

In *Mancari*, a non-Indian challenged the constitutionality of Congress's inclusion, in the Indian Reorganization of Act of 1934, of a hiring preference for American Indians who sought employment with the federal Bureau of Indian Affairs (BIA). Congress's purpose, in so doing, was simple:

> [T]o give Indians a greater participation in their own *self-government*; to further the Government's *trust obligation* toward Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect the *Indian tribal life*.[13]

Thus, "[t]he overriding purpose [of the Act] . . . was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,"[14] and thereby "strengthen tribal government. . . ."[15] Therefore, Congress's authority to adopt the preference:

> [T]urns on the *unique legal status of Indian tribes* under *federal law* and upon the *plenary power of Congress*, based on a history of *treaties* and the assumption of

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[13] *Mancari*, 417 U.S. at 541-42 (emphasis added).

[14] *Id.* at 542.

[15] *Id.* at 543.

> a "*guardian-ward*" status to legislate on behalf of federally recognized tribes.[16]

Specifically, *Mancari* recognized that the Indian Commerce Clause,[17] in giving Congress the power to "regulate Commerce with the Indian tribes[,] . . . singles out Indians as a proper subject for separate legislation [by Congress]."[18] Similarly, the Treaty Clause[19] authorized Congress to "deal with Indian tribes."[20] Finally, Congress's special relationship with Indian tribes was grounded, not just in the Constitution, but also was "derived from historical relationships" between the United States government and American Indians and the "solemn commitment of the Government toward Indians[ ]":[21]

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless, and dependent people; needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation

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[16] *Id.* at 551 (emphasis added).

[17] U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

[18] *Mancari*, 417 U.S. at 552.

[19] U.S. Const. art. II, sec. 2, cl. 2 (App. 23).

[20] *Mancari*, 417 U.S. at 552.

[21] *Id.*

> and to prepare the Indians to take their place as independent, qualified members of the modern body politic.[22]

Therefore, the conflict between Congress's special treatment of American Indians – by enacting a hiring preference for the BIA – and the Constitution's equal protection guarantee is resolved by recognizing Congress's special and unique relationship with American Indians:

> As long as the special treatment [of American Indians] can be tied rationally to the *fulfillment of Congress' unique obligation toward Indians*, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to *further Indian self-government*, we cannot say *Congress'* classification violates due process.[23]

Mancari should have left it there. But the Court, quite unnecessarily, added this dictum:

> [T]his preference does not constitute "racial discrimination." It is not even a racial preference. . . . The preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities. . . . . . Here the preference is reasonably and legitimately

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[22] *Id.*

[23] *Id.* at 555 (emphasis added).

> related to a legitimate, nonracially based goal.[24]

Worse yet, the Court inserted more dictum via this footnote:

> The preference is not directed toward a "racial" group consisting of "Indians;" instead, it applies only to members of "federally recognized tribes." This operates to exclude many individuals who are racially to be classified as "Indians." In this sense the preference is totally political rather than racial in nature.[25]

It is little wonder, therefore, that federal courts, in seeking to sustain any special treatment accorded American Indians by States or their political subdivisions, have used the seemingly safe harbor provided by *Mancari*'s political-racial distinction. Yet that safe harbor is an illusion. *Mancari* is not grounded on such a clearly unconstitutional distinction – it is beyond dispute that tribal membership is based on race, ancestry, or descent – but instead upon Congress's unique historical trust relationship and its plenary and constitutional powers over Indians. Thus, the question Mr. Roberts presents is not whether *Mancari* was decided correctly – for these purposes here it was – but instead whether *Mancari* provides safe harbor, free from application of strict

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[24] *Id.* at 553-54.

[25] *Id.* at 554.

scrutiny under the Fourteenth Amendment's Equal Protection Clause,[26] to States or their political subdivisions when they grant racial preferences to or discriminate against American Indians.

2. *Mancari*'s Dictum Is Without Factual Basis.

Ironically, the Indian Reorganization Act of 1934, which *Mancari* construed, does not afford a preference to "members" of "federally recognized tribes"; instead, it defines "Indian" to require either Indian blood quantum or descent from Indians, regardless of tribal membership:

> The term "Indian" as used in this Act shall include all persons *of Indian descent* who are members of any recognized Indian tribe now under federal jurisdiction; and all persons who are *descendents of such members* who were, on June 1, 1934, residing with the present boundaries of any Indian reservation; and shall further include *all other persons of one-half or more Indian blood.*[27]

Thus, *Mancari*'s dictum is based, not on Congress's statutory definition, but on the erroneous and illegal

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[26] U.S. Const. amend. XIV, sec. 1 (App. 23).

[27] Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (now codified as 25 U.S.C. § 479) (App. 24) (emphasis added).

regulation implementing the Indian preference, which even so, included an element of race:

> An *Indian* has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an *individual must be one-fourth or more degree Indian blood and* be a member of a federally recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an *Indian* he shall be given preference in filling the vacancy.[28]

It is little wonder that, just three years after *Mancari* was decided, the BIA recognized that it could not alter the express definition adopted by Congress,[29] as it had in its 1974 regulation, and changed that regulation, to mirror the statute:

> For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons *of Indian descent* who are:
>
> (a) Members of any recognized Indian tribe now under Federal Jurisdiction;

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[28] *Mancari*, 417 U.S. at 554, n. 24, citing 44 BIA Manual 335, 3.1 (*see* App. 26) (emphasis added).

[29] *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) ("[W]here . . . the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.").

(b) *Descendants of such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) *All others of one-half or more Indian blood* of tribes indigenous to the United States. . . .[30]

Therefore, because there is no factual basis for the political-racial distinction set forth in *Mancari*'s dictum, federal courts considering the constitutionality of preferential or discriminatory treatment of Indian tribes or their members, pursuant to legislation or regulation adopted by States and their political subdivisions, may not rely upon *Mancari*'s dictum.

3. *Mancari*'s Dictum Does Not Survive *Adarand*.

In *Adarand*, this Court held that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[31] Furthermore, "whenever the government treats

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[30] 25 C.F.R. § 5.1 (43 FR 2393, Jan. 17, 1978) (App. 25) (emphasis added).

[31] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). Justice O'Connor repeats Justice Powell's "defense of this conclusion": "When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."

(Continued on following page)

any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[32] Finally:

> [A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[33]

Thus, *Mancari*'s political-racial distinction is not only unnecessary dictum that lacks a factual basis, but it is also patently inconsistent with *Adarand*. Therefore, any post-*Adarand* analysis of *Mancari* concerning Indian preferences must ask whether Congress's plenary powers over, and unique relationship with, American Indians provide Congress a compelling interest – that of advancing Indian self-government – and whether Congress has pursued that interest in the most narrowly tailored manner possible.[34] But whether *Mancari*, in that narrow context, survives *Adarand* is not the issue now before this Court. Instead, the only issue that Mr. Roberts presents is whether States may utilize *Mancari*'s

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University of California Regents v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.) (footnote omitted).

[32] *Adarand*, 515 U.S. at 230.

[33] *Id.* at 227.

[34] *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

political-racial distinction as a safe harbor to shield themselves from a federal court's use of strict scrutiny to consider the constitutionality of legislation or regulation that prefers or discriminates against tribal members.

II. *MANCARI* PROVIDES NO SAFE HARBOR FOR THE STATE OF MONTANA.

In an *Adarand* world of race neutrality, *Mancari* provides no safe harbor for race-conscious State legislation or regulation by the mere incantation of the magical phrase, "tribal member." Instead, a reviewing federal court must apply *Adarand* or its predecessor, *Croson*.[35]

A. THE STATE OF MONTANA LACKS CONGRESS'S POWER OVER AND ITS UNIQUE RELATIONSHIP WITH AMERICAN INDIANS OR THEIR TRIBES.

Congress's authority to deal in a different fashion with Indian tribes and their members is based upon its plenary and constitutional powers over Indians as well as its historical and unique trust relationship with American Indians. States, on the other hand, have neither such authority nor any such relationship. In fact, this Court has held that States may stand in the shoes of the federal government

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[35] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

regarding American Indians only when Congress expressly delegates certain of its power to the State:

> It is settled that "the unique legal status of Indian tribes under federal law" permits *the Federal Government* to enact legislation singling out tribal Indians, legislation that might *otherwise be constitutionally offensive. Morton v. Mancari*, 417 U.S. 535, 551-52. *States do not enjoy this same unique relationship* with Indians, but Chapter 36 is not simply another state law. It was *enacted in response to a federal measure explicitly designed to readjust the allocation of [State and federal] jurisdiction* over Indians.[36]

There is no such express delegation here, nor does Montana claim any. Montana's justification for the preference it provides all tribal members throughout the Nation is that it is honoring treaty hunting rights on Montana reservations, rights which differ among the seven reservations. Obviously, that claim has no merit. First, this Court has held that those hunting rights, if they exist, can "only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'"[37] Second, as this Court also recognized, "the quantity of such land was substantially reduced by the allotment and alienation

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[36] *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 439 U.S. 463, 500-501 (1978) (emphasis added).

[37] *Montana v. United States*, 450 U.S. 544, 558-59 (1981).

of tribal lands[,]"[38] including non-Indian-owned fee lands such as those that Mr. Roberts seeks to use for hunting. Third, if Montana's purpose were to protect Crow treaty hunting rights, for example, Montana would have limited hunting on non-Indian-owned fee lands within the Crow Reservation to members of the Crow Tribe.

Unfortunately, the Ninth Circuit issued only a two-page, unpublished Memorandum Opinion that relies solely on *Mancari*'s dictum ("classifications based on membership in federally recognized Indian tribe are political, rather than racial, and thus subject to rational basis review)."[39] Thus, the Ninth Circuit never addressed the fundamental question raised by the State of Montana's assertions and Mr. Roberts' argument: whether Montana may lay claim to the same constitutional and historical bases as does Congress for a relationship with Indian tribes and their members to permit adoption of racial preferences that "further Indian self government."[40]

Had the Ninth Circuit addressed this question, this Court's holding in *Mancari* would have compelled an answer of "No." Only Congress has a Treaty Power; only Congress is empowered by the Indian Commerce Clause;[41] and only Congress has plenary

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[38] *Id.* at 559.

[39] *Roberts v. Hagener*, No. 07-35197, slip op. (9th Cir. July 18, 2008) (App. 2).

[40] *Mancari*, 417 U.S. at 555.

[41] U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

authority over Indians. Therefore, only Congress has the unique trust relationship of guardian and ward with American Indian Tribes that permits it, for certain, limited purposes, to grant American Indians preferential treatment. Because the State of Montana has neither these powers nor this relationship, it may not rely on *Mancari* to demand that federal courts utilize rational basis scrutiny of either preferential or discriminatory treatment of American Indians or tribal members.

Denied use of *Mancari*, the Ninth Circuit must apply, and the State of Montana must satisfy, "strict scrutiny" to justify its use of racial preferences, as required by *Adarand* and *Croson*. Robbed of its pretense that it stands in the shoes of Congress vis-à-vis American Indians, Montana provides no compelling governmental interest for its racial classification. Below, the only interest asserted by Montana was one of administrative convenience, which, as this Court held in *Croson*, is not compelling.[42] Moreover, the State of Montana's hunting regulation[43] fails narrow tailoring because it includes all persons who are tribal members in the entire United States, irrespective of whether they reside in Montana or are members of

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[42] *Croson*, 488 U.S. at 472 ("[A]dministrative convenience[,] . . . standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny.").

[43] Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at http://fwp.mt.gov/hunting/regulations.html (App. 23-24).

Montana tribes. This regulation transparently includes all Indians as a discrete racial group.

This Court should grant this Petition, reverse the Ninth Circuit's holding that States and their political subdivision may use *Mancari* to shield their adoption of raced-based legislation or regulation from the application of "strict scrutiny," and remand this case for a ruling as to whether the State of Montana's regulation comports with *Adarand* and *Croson*.

B. THE STATE OF MONTANA MISTAKENLY BELIEVES THAT IT STANDS IN THE SHOES OF CONGRESS.

The State of Montana's big game hunting regulations[44] are not its only foray into the enactment of legislation that provides preferences to American Indians as a discreet racial group; it has a host of such laws.[45] Furthermore, the Montana Legislature is

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[44] *Id.*

[45] For example, the State of Montana provides free college tuition for "persons of one-fourth Indian blood or more who have been bona fide residents of Montana for at least one year prior to enrollment in the Montana university system." Mont. Code Ann. § 20-25-421(2)(c)(i). It provides that "a state agency that operates within an Indian reservation shall give a preference in hiring for employment with the state agency to an *Indian* resident of the reservation." Mont. Code Ann. § 2-8-111(1) (emphasis added). Finally, Montana provides that, "any contract awarded by a state agency for a state construction project within the exterior boundaries of an Indian reservation . . . must provide that a preference in hiring for positions of employment

(Continued on following page)

not alone in its view that there is no constitutional bar to its ability to utilize racial classifications regarding American Indians.

In *State of Montana v. Shook*,[46] the Montana Supreme Court considered the constitutionality, under the Montana Constitution, of the very hunting regulation presented here. That Court, relying on *Mancari*, held that the Montana Legislature has the same powers to single out Indians or tribal members as does Congress because it believed that States are bound to carry out Congress's unique obligations to Indians:

> [F]ederal Indian law regarding the rights of *Indians* is binding on the state. Therefore, the state equal protection guarantee . . . must allow for state classifications based on tribal membership if those classifications can rationally be related to the *fulfillment of the unique federal, and consequent state*, obligation toward *Indians*.[47]

Therefore, the Montana Supreme Court held that Montana may make racial distinctions not only with respect to tribal membership, but also with respect to the discrete racial class that is American Indian, subject only to rational basis review, because federal

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be given to *Indian* residents of the reservation." Mont. Code Ann. § 18-1-110 (emphasis added).

[46] 67 P.3d 863 (2002), *cert. den.*, 540 U.S. 815 (2003).

[47] *Id.* at 866 (emphasis added).

law provides States with Congress's unique relationship with American Indians:

> [W]e need only address whether the State regulation that prohibits non-tribal members from hunting big game on Indian reservations is rationally tied to the *fulfillment of [Montana's] unique obligation toward Indians.*[48]

This abuse and misuse of this Court's holding in *Mancari* will end only with a ruling from this Court as to the meaning of *Mancari* and its inapplicability to States and their political subdivisions. Therefore, this Court should grant this Petition for Writ of Certiorari.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari to clarify that *Mancari* does not rely on the political-racial distinction for its application to federal legislation, but rather relies on Congress's plenary and constitutional powers over Indians as well as its historical and unique trust relationship with American Indians. More importantly, this Court should also grant this Petition to make explicit that in no event may States or their political subdivisions rely on *Mancari*'s political-racial distinction to justify

[48] *Id.* at 867 (emphasis added).

legislation or regulation that singles out American Indians or tribal members for preferential or discriminatory treatment. Finally, this Court should grant this Petition to hold that all such State legislation and regulation is subject to strict scrutiny as provided for in *Croson* and *Adarand*.

Respectfully submitted,

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Submitted October 16, 2008

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY V. ROBERTS, Plaintiff-Appellant, v. JEFF HAGENER, Director, Montana Department of Fish, Wildlife and Parks; et al., Defendants-Appellees.	No. 07-35197 D.C. No. CV-05-00153-RFC MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted July 10, 2008**
Seattle, Washington

(Filed Jul. 18, 2008)

Before: CLIFTON and N.R. SMITH, Circuit Judges, and SANDOVAL***, District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Brian E. Sandoval, United States District Judge for the District of Nevada, sitting by designation.

Randy Roberts appeals the district court's grant of summary judgment in favor of the State of Montana and numerous Montana government officials (collectively "Defendants" or "Montana") in his suit alleging that a Montana big game hunting regulation violates the Equal Protection Clause of the Fourteenth Amendment. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

Both the United States Supreme Court and this court have long held that classifications based on membership in a federally recognized Indian tribe are political, rather than racial, and thus subject to rational basis review. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 551-55 (1974); *Means v. Navajo Nation,* 432 F.3d 924, 932 (9th Cir. 2005); *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1279 (9th Cir. 2004). The challenged regulation permits only "tribal members" to hunt big game on Indian reservations in Montana. The regulation clearly classifies based on tribal membership rather than racial status as an Indian. Accordingly, the district court correctly reviewed the regulation under the rational basis standard.[1] *Mancari,* 417 U.S. at 554; *Kahawaiolaa,* 386 F.3d at 1279.

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[1] We reject Roberts's assertion that Montana lacked the power to enact the regulation. The regulation does not "indirectly" regulate hunting and fishing by members of the Crow Tribe on Indian lands nor does it discriminate against or impede any authorized regulation of the Crow Tribe. *See United States v. Montana,* 686 F.2d 766, 768-69 (9th Cir. 1982) (describing, after remand, limitations on Montana's power "to regulate

(Continued on following page)

The district court also correctly granted summary judgment in Montana's favor. Under the highly deferential rational basis test, a classification will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Kahawaiolaa,* 386 F.3d at 1279 (quoting *Heller v. Doe,* 509 U.S. 312, 319-20 (1993)). Montana asserts that the regulation furthers two legitimate governmental purposes: 1) promoting the conservation of wildlife within Indian Reservations; and 2) avoiding the logistical difficulties of regulating hunting differently for tribal members and non-members within reservations because of the varying land ownership patterns within Indian Reservations. Both of these reasons are "plausible policy reasons" for enacting the regulation and are rationally related to allowing only tribal members to hunt big game on Indian reservations. *Id.* at 1280.

AFFIRMED.

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hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

RANDY V. ROBERTS, Plaintiff vs. JEFF HAGENER, Director, Montana Department of Fish, Wildlife & Parks; VICTOR WORKMAN, TIM MULLIGAN, STEVE DOHERTY, JOHN BRENDEN, and SHANE COLTON, Commissioners, Montana Fish, Wildlife & Parks Commission; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; MONTANA FISH, WILDLIFE & PARKS COMMISSION; BRIAN A. SCHWEITZER, Governor, State of Montana, and the STATE OF MONTANA Defendants.	CV-05-153-BLG-RFC ORDER (Filed Aug. 4, 2006)

BACKGROUND

Plaintiff Randy Roberts is a non-Indian citizen of Montana who is not an enrolled member of the Crow Tribe or any other tribe of Indians. He has no Indian blood and thus will never be eligible to be a member

of the Crow Tribe or any other tribe of Indians. Roberts has permission to hunt big game on his family's fee land within the exterior boundaries of the Crow Reservation, but a regulation promulgated by the Montana Fish, Wildlife, and Parks Commission ("the Commission") prohibits him and all non-tribal members from hunting big game on Indian Reservations.

The regulation at issue has been in effect in one form or another for over 40 years. It currently states in its entirety: "Only tribal members are allowed to hunt big game on Indian Reservations, unless otherwise provided for by agreements between the State of Montana and Tribal Government. For questions contact the respective Tribal Government office." In *Montana v. Shook,* the Montana Supreme Court held that a substantially similar regulation promulgated by the Commission in 1997 did not violate constitutional guarantees of equal protection under the Montana Constitution.[1] 67 P.3d 863, 867 (Mont. 2003) (holding the regulation was rationally related to the federal, and consequent state, obligation to recognize tribal hunting privileges).

Roberts, through his attorneys at the Mountain States Legal Foundation, filed suit seeking this Court's declaration that the regulation violates his right to equal protection under the Fifth and Fourteenth

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[1] The 1997 regulation at issue in *Shook* stated: "Big game hunting privileges on Indian Reservations are limited to tribal members only." *Shook*, 67 P.3d at 865.

Amendments to the Constitution of the United States. He does not ask this Court to revisit *Shook* and reevaluate the regulation under the Montana Constitution. Roberts asserts this regulation unconstitutionally discriminates against him because of his race, heritage, and immutable bloodline. Roberts further asserts Montana has promulgated this regulation without any federal mandate and without any evidence of past discrimination requiring race-conscious relief.

Presently, Montana has moved to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

ANALYSIS

Montana argues this case must be dismissed for failure to state a claim pursuant to Fed. R.Civ. P. 12(b)(6) because the classification of individuals on the basis of enrollment in a federally recognized Indian tribe is a political classification, not a racial classification, which is subject only to rational basis review. Therefore, Montana believes 12(b)(6) dismissal is appropriate because there is no set of facts which, if proven, would show the regulation is not a valid exercise of the state's police power and not rationally related to legitimate state purposes.

Roberts opposes this motion on several grounds. He first argues that summary dismissal is improper under the legal standard for 12(b)(6) motions because for the purposes of this motion Montana has conceded

the accuracy of the facts in the complaint. Second, Roberts claims the regulation warrants strict scrutiny because it discriminates based on his race, ancestry and national origin. According to Roberts, the regulation cannot survive strict scrutiny. Third, Roberts argues in the alternative that even if rational basis review is appropriate, the regulation fails that test, and in any event, warrants a factual inquiry by the Court.

I. Roberts' argument that the standard of review of 12(b)(6) motions requires denial of this motion is incorrectly premised on the application of strict scrutiny

In support of this argument that 12(b)(6) dismissal is inappropriate procedurally, Roberts cites *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 229-30 (1995) (all racial qualifications imposed by federal, state, or local governments must meet strict scrutiny) and *Shaw v. Hunt,* 517 U.S. 899, 909-10 (1996) (providing the standards a race-conscious regulation must meet to survive strict scrutiny). Roberts argues he has made a prima facie case of discrimination by showing that he was "treated unequally because of" his race. *Adarand Constructors, Inc.,* 515 U.S. at 229-30. Roberts cites *Shaw* for the proposition that once a plaintiff has made the prima facie showing required by *Adarand,* the burden of sustaining the constitutionality shifts to the government, which must establish that it is remedying "identified discrimination" and that it had a "strong

basis in evidence" to conclude that remedial action was necessary. 517 U.S. at 909-910. Thus, according to Roberts, summary dismissal is inappropriate because for purposes of this motion Montana has admitted (1) the regulation discriminates based on race and that (2) this discrimination is not a remedy for past discrimination.

Montana responds that it admits only that classifications based on tribal membership are made, not that the classification is unconstitutional race discrimination. In that regard, Montana is apparently correct that Robert is "twist[ing] a factual admission into a legal concession." If admitting facts for the purposes of a motion to dismiss constituted an admission of the underlying legal argument, no 12(b)(6) motions would ever succeed.

More importantly, Roberts' argument is premised on applying strict scrutiny to the regulation at issue in this case, as was done in *Adarand* and *Shaw*. However, as discussed in the following section, classifications based on tribal membership are subject to rational basis review – not strict scrutiny. Under rational basis review, "the government has no obligation to produce evidence to sustain the rationality of a statutory classification; rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004).

II. The regulation at issue in this case is subject to Rational Basis Review

The first step in any equal protection challenge is to determine the appropriate level of scrutiny. In the equal protection context, determining the level of scrutiny ultimately determines the constitutional validity of the regulation at issue. *See Kahawaiolaa,* 386 F.3d at 1277, 1279 (noting that rational basis review is "highly deferential" because regulation must be upheld under rational basis review "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

Roberts correctly notes that strict scrutiny is applied to classifications based on race or national origin, ancestry, or alienage. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 312-313 n.4 (1976) (citations omitted). Although Roberts' "immutable bloodline" is the reason he cannot lawfully hunt big game on his family's fee land, and thus he is discriminated against because of that bloodline, the law of equal protection does not consider this invidious racial discrimination. It is well-established that classifications of individuals based on membership in a federally recognized Indian tribe is not a racial, but a political classification, subject only to rational basis review. *E.g. Morton v. Mancari,* 417 U.S. 535, 555 n.24 (1974); *United States v. Antelope,* 430 U.S. 641, 645-46 (1978); *Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 733-34 (9th Cir. 2003); *Morris v. Tanner,* 288 F.Supp. 1133, 1136 (D.

Mont. 2003). This means that the regulation is valid unless it bears no rational relationship to Montana's objectives. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 501 (1979) (*Yakima*).

In *Mancari,* non-Indian, non-tribal member BIA employees argued that BIA employment preferences for tribal members was invidious racial discrimination in violation of the Equal Protection Clause. 417 U.S. at 537, 551. In holding that the BIA practice was not "racial discrimination" and not even a "racial" preference, the Supreme Court stated the "preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Mancari,* 417 U.S. 554. In an o$ quoted passage, the Court further observed:

> [l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Mancari, 417 U.S. at 552. Thus, even though the plaintiffs were treated differently because they were not tribal members, and presumably could not be tribal members because they did not possess the requisite amount of Indian blood, the Court made clear this was not invidious racial discrimination. Similarly, there is no invidious racial discrimination in this case because the regulation prohibits non-members, not those without the requisite amount of Indian blood, from hunting big game within the reservation boundaries.

Roberts first attempts to evade the clear rule of *Mancari* by claiming that Montana lacks the authority to impose the regulation. Roberts asserts that Montana "has adopted its discriminatory hunting regulation *sua sponte* and now seeks to shield itself from constitutional scrutiny by hiding beneath the shroud of some federal trust relationship." In support, Roberts cites *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* (*Yakima*), for its statement that states do not have the same relationship with Indians as does Congress. 439 U.S. 463, 501 (1979).

However, Montana is free to regulate hunting by non-tribal members on reservations unless precluded by an act of Congress or tribal self-governance matters. *Shook,* 67 P.3d at 867 (citing *Montana v. United States,* 450 U.S. 544, 564 (1981); *State ex rel. Nepstad,* 427 P.2d at 692). After *Montana v. United States* was remanded, the Ninth Circuit enumerated the specific holdings of the of the Supreme Court's opinion.

United States v. Montana, 686 F.2d 766, 768-769 (9th Cir. 1982). The Ninth Circuit understood *Montana* as holding that:

> [t]he State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:
>
> (a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on [Indian] lands.
>
> (b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe.

Id. Clearly the regulation (a) does not indirectly regulate hunting by tribal members and (b) was promulgated in order to allow Indian tribes to manage big game inhabiting Indian reservations. Accordingly, under the *Montana* line of cases Montana is authorized to regulate hunting by non-members on the Crow reservation.

Further, the *Yakima* Court reviewed a state law enacted "under explicit authority granted by Congress" as if it were a federal law. 439 U.S. at 500-02. It is true that other than the court opinions cited above which recognize Montana's authority to regulate hunting by non-members on Indian reservations,

there is no law explicitly authorizing Montana to prohibit non-tribal members from hunting big game on Indian reservations. However, Montana claims the regulation was enacted to effectuate the reservation of hunting rights to the Crow Tribe as was done by the Second Treaty of Fort Laramie. That treaty provided that the Crow land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . " Second Treaty of Fort Laramie, Art. II, May 7, 1868; *See also Montana,* 450 U.S. at 554 (explaining that the Second Treaty of Fort Laramie "gave the Crow Indians the sole right to use and occupy the reserved land."). The Montana Supreme Court has held that Indian treaties are as much a part of Montana law as the state's own laws and Constitution, are effective and binding on the state legislature, and are "superior to the laws of the state, including the police power." *Shook,* 67 P.3d at 352. Thus, according to Montana, it acted pursuant to federal authorization in promulgating the regulation at issue.

Roberts argues that even if the Second Treaty of Fort Laramie reserved exclusive hunting rights to the Crow Tribe, such a treaty would be invalid because treaties must conform to the Constitution. *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution"). However, classifications based on a membership in a federally recognized Indian tribe are not suspect and are

constitutional as long as they are rationally related to a legitimate government purpose. Thus, the Second Treaty of Fort Laramie would also be reviewed under the "highly deferential" rational basis standard.

Second, Roberts argues that *Adarand* and other intervening Supreme Court decisions abrogated the rule first announced in *Mancari,* that classifications based on tribal membership do not warrant strict scrutiny.[2] In 2005, the Ninth Circuit Court of Appeals flatly rejected this argument, stating that *Rice v. Cavetano,* 528 U.S. 495 2000, "explicitly reaffirmed and distinguished the political, rather than racial, treatment of Indian tribes as explained *in Mancari.*" *Kahawaiolaa,* 386 F.3d at 1279. Although the court stated that classifications based on the presence or absence of Indian blood, but not on membership or non-membership in tribal groups, could be race discrimination subject to strict scrutiny," *Id.* (citing *Adarand*, 515 U.S. at 227), that statement does not help Roberts in this case. Here, even though the regulation ultimately discriminates based on race, it classifies based on tribal membership. The fact that Indian blood is a prerequisite to tribal membership

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[2] Roberts also cites *Williams v. Babbitt,* in which Judge Kozinski of the Ninth Circuit opined that the *Adarand* may mean that "*Mancari*'s days are numbered." 115 F.3d 657, 665 (9th Cir. 1997). In any event, speculation about the demise of a Supreme Court case does not permit lower courts to ignore it. *United States v. Pacheco-Zepeda* 234 F.3d 411, 414 (9th Cir. 2000).

was not a factor in *Mancari* or any of its progeny and is thus irrelevant to this case.

Roberts argument that strict scrutiny will apply in this case was again rejected one year after *Kahawaiolaa*. In *Means v. Navajo Nation*, the Ninth Circuit reaffirmed the principle that "[l]egislation that singles out Indians for particular and special treatment is in a special category because of the historical relationship of the United States with Indians and the Indian Commerce Clause, and as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed." 432 F.3d 924, 932-33 (9th Cir. 2005) (internal quotations omitted). According to the court, "both the Supreme Court and our court have continued to rely on *Mancari* and we are bound to follow it." *Means*, 432 F.3d at 932.

Although Roberts's "equal protection argument has real force," "the weight of established law" requires this Court to review the regulation for a rational basis. *Id.*

III. Conclusion

Having concluded that the regulation is subject to rational basis review, the only remaining issue for this motion to dismiss, and indeed the only remaining issue in this case, is whether there is any set of facts which, if proven, would show that the disparity of treatment caused by the regulation is not rationally

related to a legitimate government interest. Fed. R. Civ. P. 12(b)(6); *Kahawaiolaa*, 386 F.3d at 1279. If there are no such set of facts, the case must be dismissed.

Under the "highly deferential" standard of rational basis review, Montana has neither a burden of production nor a burden of proof; rather, Roberts has the burden of negating every conceivable basis which might support the regulation. *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Kahawaiolaa*, 386 F.3d at 1279. Although it is very likely that the regulation is rationally related to a legitimate governmental interest, it is Roberts' burden to prove otherwise and he is entitled to an opportunity to do so.

With that burden in mind, Roberts is hereby on notice that this Court intends to convert Montana's Motion to Dismiss into a Rule 56 motion for summary judgment. *See United States v. Ritchie,* 342 F.3d 903, 907 (9th Cir. 2003). This will allow Roberts an opportunity to attempt to demonstrate fully the lack of rational basis for this regulation.

Accordingly, **IT IS HEREBY ORDERED** that within thirty (30) days of the entry of this Order, Roberts shall show how the regulation is not rationally related to a legitimate governmental interest and why his claim should not be dismissed as a matter of law. Montana may file a response brief within twenty (20) days after receipt of Roberts' filing.

Dated this 4th day of August, 2006.

/s/ Richard F. Cebull
RICHARD F. CEBULL
U.S. DISTRICT JUDGE

cc:
Joseph Becker
Ronald Youde
Sarah Bond

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

RANDY V. ROBERTS,	**CV-05-153-BLG-RFC**
Plaintiff,	
vs.	**ORDER**
JEFF HAGENER, Director, Montana Department of Fish, Wildlife & Parks; VICTOR WORKMAN, TIM MULLIGAN, STEVE DOHERTY, JOHN BRENDEN, and SHANE COLTON, Commissioners, Montana Fish, Wildlife & Parks Commission; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; MONTANA FISH, WILDLIFE &PARKS COMMISSION; BRIAN A. SCHWEITZER, Governor, State of Montana, and the STATE OF MONTANA	(Filed Feb. 2, 2007)
Defendants.	

On August 4, 2006, this Court entered an order notifying the parties that it was converting Defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss into a

motion for summary judgment (*Doc. #18*). In that Order, the Court recognized both the sound reasoning behind Plaintiff's equal protection argument and the reality of contrary Supreme Court authority. In light of that clear authority, the Court concluded the regulation promulgated by the State of Montana prohibiting those who are not tribal members from hunting big game on land within Indian Reservations must be reviewed under the highly deferential rational basis standard. Under rational basis review, it is Plaintiffs burden to prove the disparity of treatment caused by the regulation is not rationally related to a legitimate governmental interest. *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1279 (9th Cir. 2004) (citing *Heller v. Doe,* 509 U.S 312, 319-20 (1993)). Plaintiff's burden requires it to negate every conceivable basis which might support the regulation. *Id.* Accordingly, the Court allowed Plaintiff the opportunity to prove there was no rational basis for the regulation at issue.

The Court has reviewed the briefs submitted in response to the August 4, 2006 Order. The State asserts the regulations further two legitimate governmental interests: (1) preserving big game species in general, and (2) avoiding the regulatory and law enforcement difficulties of attempting to regulate nonmember hunting on a checker-boarded reservation, while avoiding interfering with tribal members who may be lawfully hunting on that land. It is clear that precluding nonmembers from hunting big game on land within the exterior boundaries of Indian

Reservations furthers both of those interests. For that reason, Plaintiff has failed to show how the regulation is not rationally related to a legitimate governmental interest.

Accordingly, **IT IS HEREBY ORDERED** that Defendants are entitled to judgment as a matter of law.

The Clerk of Court shall notify the parties of this Order and enter judgment for Defendants.

Dated this 2d day of February, 2007.

/s/ Richard F. Cebull
RICHARD F. CEBULL
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA

BILLINGS DIVISION

RANDY V. ROBERTS, Plaintiff, v. JEFF HAGENER, Director, Montana Department of Fish, Wildlife & Parks; VICTOR WORKMAN, TIM MULLIGAN, STEVE DOHERTY, JOHN BRENDEN, and SHANE COLTON, Commissioners, Montana Fish, Wildlife & Parks Commission; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; MONTANA FISH, WILDLIFE &PARKS COMMISSION; BRIAN A. SCHWEITZER, Governor, State of Montan [sic], and the STATE OF MONTANA Defendants.	**JUDGMENT IN A CIVIL CASE** **CV-05-153-BLG-RFC** (Filed Feb. 2, 2007)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

JUDGMENT is hereby entered in favor of the Defendants.

DATED: February 2, 2007

Patrick E. Duffy
CLERK

/s/ Terri Devitt
DEPUTY CLERK

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, article 1, sec. 8, cl. 3, The Indian Commerce Clause:

The Congress shall have the Power . . . To regulate Commerce . . . with the Indian Tribes; . . .

U.S. Constitution, article II, sec. 2, cl. 2, The Treaty Clause:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .

U.S. Constitution, amend. XIV, sec. 1, The Equal Protection Clause:

[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.

Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at http://fwp.mt.gov/hunting/regulations.html

Only tribal members are allowed to hunt big game on Indian Reservations, unless otherwise provided for by

agreements between the State of Montana and Tribal Government.

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25 U.S.C. § 479 (originally from Section 19 of the Indian Reorganization Act of 1934)

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction; and all persons who are descendents of such members who were, on June 1, 1934 residing with the present boundaries of any Indian reservation; and shall further include all other persons of one-half or more Indian blood." For purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

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44 BIA Manual 335, 3.1 (1974)

An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe. It is the policy for promotional consideration that where two or more

candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an Indian he shall be given preference in filling the vacancy. . . . .

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25 C.F.R. § 5.1 (Jan. 17, 1978; replacing 44 BIA Manual 335, 3.1)

For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal Jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska. . . . .

Supreme Court, U.S.
MOTION FILED

NOV 20 2008

William K. Suter,
Clerk

No. 08-519

In the
Supreme Court of the United States

RANDY ROBERTS,

Petitioner,

v.

JEFF HAGENER, Director, Montana Department of Fish, Wildlife and Parks, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner Randy Roberts. Petitioner, Randy Roberts, granted consent to PLF to file this amicus curiae brief. However, Respondents Jeff Hagener, et al., withheld consent.

PLF believes that its amicus curiae brief brings to the attention of this Court relevant matter not already brought to its attention by the Petitioner and respectfully urges this Court to grant its motion.

DATED: November, 2008.

Respectfully submitted,

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QUESTION PRESENTED

Whether, notwithstanding the decision of this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), the Fourteenth Amendment's Equal Protection Clause requires that strict judicial scrutiny be applied to any legislation or regulation by a state or its political subdivisions that grants preferential treatment to, or discriminates against, American Indians or American Indian tribal members, without express delegation of such authority from Congress?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully moves this Court, pursuant to Supreme Court Rule 37.2(b), for leave to file the accompanying amicus curiae brief in support of Petitioner.[1] Counsel of record for all parties received notice at least 10 days prior to the due date of amicus' intention to file this brief.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. For 35 years, PLF has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Despite Justice John Marshall Harlan's admonition 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(1896) (Harlan, J., dissenting), the Montana Hunting Regulation, at issue in this case, treats individuals differently based upon their race. This case raises an important issue of constitutional law—the applicability of *Morton v. Mancari*, 417 U.S. 535 (1974), to racial classifications adopted by states, without congressional authority, in light of this Court's decision in *Adarand*, 515 U.S. 200. Amicus considers this case to be of special significance in that it concerns the fundamental issue of whether *all* race-based classifications are required to be reviewed under strict scrutiny. This issue is particularly compelling when the challenged regulation authorizes any Indian tribal member to hunt big game on non-Indian-owned fee lands within any of Montana's seven Indian reservations, but the non-Indian owners of that land are excluded from hunting big game on their own property.

The Ninth Circuit's decision below is based upon the political-racial distinction set out in *Mancari*. It held that Montana's hunting preference for "[o]nly tribal members" was a political classification, not a racial classification and, thus, it was subject only to the highly deferential rational basis review. The court did not require the state to show a congressional delegation of authority. This unwarranted extension of *Mancari* opens the door for states and political subdivisions to adopt laws that create distinctions based upon race without requiring those enactments to be reviewed under strict scrutiny when challenged under the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case examines what standard of review applies under the Equal Protection Clause to a state regulation that excludes non-Indian owners of fee land from hunting big game on their own property while allowing any tribal member to hunt on that same non-Indian-owned fee land[2] The discriminatory Montana hunting regulation provides: "*Only tribal members* are allowed to hunt big game on Indian Reservations, unless otherwise provided for by agreements between the State of Montana and Tribal Government." Petition for Writ of Certiorari (Pet.) at 3. The discriminatory hunting regulation was adopted without federal authority for the purpose of promoting wildlife conservation while avoiding the administrative difficulties of regulating "differently for tribal members and non-members within reservations because of the varying land ownership patterns within Indian Reservations." Pet. at 3.

In the decision below, the Ninth Circuit relied upon *Mancari*, 417 U.S. 535, to find that the Montana hunting preference was a political classification, not a racial classification, subject only to rational basis review. Pet. at 2. *Mancari*'s political classification has no place here. As explained in *Washington v.*

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[2] Through several Acts of Congress, the Crow Reservation consists of approximately 2.23 million acres. *Montana v. United States*, 450 U.S. 544, 548 (1981). "Roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent." *Id.*

Confederated Bands & Tribes of the Yakima Indian Nation: "It is settled [in *Mancari*] that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians." 439 U.S. 463, 500-01 (1979) (citation omitted).

Montana has an obligation to treat all its citizens alike. The Montana hunting regulation violates the equal protection rights of non-Indian fee owners of land because it discriminates against them, while providing a race-based preference to tribal members. Although *Adarand*, 515 U.S. at 227, requires all racial classifications imposed by federal, state, and local governmental actors to be reviewed under strict scrutiny, the Ninth Circuit held that the proper standard of judicial review was rational basis because the term "tribal member" was a political classification, not a racial classification. Pet. at 2.

The Ninth Circuit's reliance on *Mancari*, 417 U.S. 535, is misplaced when, as here, the actions of the state are not based upon the "special relationship" the federal government has with Indian tribes. This Court should grant the Petition for Writ of Certiorari to clarify that either *Adarand* overruled *Mancari*, or *Mancari* is limited to Congress's "special relationship" with Indian tribes under which the federal government can single out tribes for different treatment under limited circumstances without triggering heightened scrutiny—but states cannot. When state actors create a racial preference for American Indians or American Indian tribal members without federal authority, it is a racial classification subject to strict scrutiny review.

REASONS FOR GRANTING THE WRIT

This case presents a question of nationwide legal and societal importance—whether states may carve out race-based preferences for American Indians or American Indian tribal members without the express authorization of Congress, notwithstanding this Court's mandate that all race-based classifications must be reviewed under strict scrutiny. The Ninth Circuit's decision below is based upon the political-racial distinction set out in *Mancari*. Without requiring the state to show a congressional delegation of authority, the circuit court held that Montana's hunting preference for "[o]nly tribal members" was a political classification, not a racial classification, and thus, it was subject only to rational basis review. As shown below, the Ninth Circuit decision conflicts with the decisions both of this Court and other appellate decisions. These conflicts require resolution by this Court.

I

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION OF WHETHER *ADARAND* OVERRULED *MANCARI*

The issue of *Mancari*'s continued vitality following this Court's decision in *Adarand*, 515 U.S. 200, is a constitutional question of extraordinary importance. It will determine to what extent States and their political subdivisions can discriminate in favor of Indians. This debate is occurring not only in the courts but among commentators, both before and after

Adarand.[3] This case comes before this Court because a cloud of constitutional uncertainty has cast its shadow over the proper application of this Court's pronouncement that all federal, state, and local racial classifications "must be analyzed by a reviewing court under strict scrutiny," *Adarand*, 515 U.S. at 227, and whether strict scrutiny applies to Indian classifications.

The federal government's power to deal with Indian tribes is based upon the plenary power of

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[3] A sampling of the legal-academic commentary includes: Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) (recognizing that *Adarand* creates an uneasy relationship between Congress' special relationship with Indian tribes recognized in *Mancari*, and the hostility to racial classifications in *Adarand*; and ultimately, between historical tradition of treating native groups differently and the idea that racial classifications are repugnant and therefore are presumed to violate equal protection norms); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 718 (2001) (*Mancari*'s overlay of race with status may have hurt as much as it helped. It is a refuge for race-conscious legislation in an *Adarand* world of race neutrality. It permits preferences and delegations of authority that otherwise would not escape strict scrutiny . . . . Moreover, the Court has yet to rise to the scholarly bait offered to replace it.); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001); Wayne R. Farnsworth, Note, *Bureau of Indian Affairs Hiring Preferences After Adarand Constructors, Inc. v. Pena*, 1996 B.Y.U. L. Rev. 503 (1996); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991); Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. Rev. 169 (1991); David Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. Rev. 191 (1991).

Congress to legislate with respect to Indian tribes.[4] *Mancari*, 417 U.S. at 551-52, recognizes that it is this unique relationship the federal government has with Indians that allows it to enact legislation singling out tribal Indians; otherwise, this legislation would be constitutionally offensive. *Id.* "States do not enjoy this same unique relationship with Indians." *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 501.

In this case, the State of Montana adopted its discriminatory hunting regulation without federal authorization. Relying upon *Mancari*, the lower court ruled that "[t]he challenged regulation permits only 'tribal members' to hunt big game on Indian reservations in Montana. The regulation clearly classifies based on tribal membership rather than racial status as an Indian." Pet. at 2. This state law is constitutionally offense because it singled out a preference to "tribal members" only and discriminated against non-Indian owners of land that are excluded from hunting big game on their own property.

This case presents an ideal vehicle for this Court to address this important constitutional issue. The court of appeals' ruling upholding the state's authority to carve out a preference for "[o]nly Indian tribes" without a showing of federal delegation or federal authority cannot be reconciled with this Court's pronouncement on the authority of government to distinguish between and among citizens on the basis of race. In *Adarand*, this Court held: "[F]ederal racial classifications, *like those of a State*, must serve a

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[4] Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2.

compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235 (emphasis added). Thereupon, reflecting on its ruling of a decade earlier in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court declared: "Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling." *Adarand*, 515 U.S. at 235. Because this Court's ruling in *Mancari*, 417 U.S. 535, held that a federal racial classification was subject to a less rigorous standard, *Mancari*, like *Fullilove*, should be deemed "no longer controlling."

In *Adarand*, this Court enunciated three propositions regarding governmental racial classifications: First, skepticism—that any preference based on racial or ethnic criteria requires searching examination and "racial classifications [are] 'constitutionally suspect.' " 515 U.S. at 223 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Second, consistency—that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." 515 U.S. at 222 (citing *Croson*, 488 U.S. at 494 (plurality opinion)). And third, congruence—that "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Moreover, this Court concluded in *Adarand* that these three propositions "all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." 515 U.S. at 227. Accordingly, this Court held:

> [A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, 515 U.S. at 227.

In *Mancari*, deciding whether an employment preference for American Indians with the Bureau of Indian Affairs (BIA) violated the equal protection component of the Due Process Clause, this Court engaged in none of the analysis later required by *Adarand*. Instead, the *Mancari* Court declared simply:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Mancari, 417 U.S. at 555. Then, as to the employment criterion under review, the Court held: "[W]here the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violated due process." *Id.*

Although it does not appear to have been the basis upon which the *Mancari* decision turned, this Court did hold that the "preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," that is, "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 554, n.24. Whether such a careful distinction survives *Adarand* is uncertain, especially in a setting such as this one where Congress, the BIA, tribal sovereignty, or

self-governance is not implicated.[5] Instead, the race-based preference was created by a state without any federal authority whatsoever solely for the purposes of wildlife conservation and administrative convenience.

Because the Montana hunting regulation carves out a special exception to benefit members of an American Indian tribe, the court of appeals should have applied strict scrutiny to determine the validity of the regulation. Instead, relying upon the "highly deferential" rational basis test announced in *Mancari*, the lower court held that the application of strict scrutiny was not required, that so long as there is "some legitimate government purpose for carving out an exemption to benefit tribal members only, the state's actions creating the race-based preference would not be disturbed." Pet. at 2-3.

Such a broad interpretation of *Mancari* would allow any state or local government to treat Indians and non-Indians differently in virtually any legislation or regulatory measure. Amicus acknowledges that no lower court should conclude that this Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). It is precisely because only this Court has the

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[5] This Court has struck down American Indian preferences when the legislation classified on the basis of race. For instance, in *Adarand*, the presumptively disadvantaged groups were "'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities.'" *Adarand*, 515 U.S. at 205 (quoting Small Business Act, 15 U.S.C. § 637(d)(2)-(3) (1994)) (emphasis added). In *Croson*, the relevant definition was United States citizens who are "'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts.'" *Croson*, 488 U.S. at 478 (quoting Richmond, Va., City Code, 12-23 (1985)) (emphasis added).

authority to overrule or limit its own prior holdings that the writ should be granted, to reconcile the tension between *Adarand* and *Mancari* on whether reviewing courts should apply strict scrutiny or the rational basis test to actions by states and their political subdivisions that carve out special benefits for members of Indian tribes.

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *MANCARI* AND *RICE V. CAYETANO*

In rejecting Randy Roberts' equal protection argument, the court of appeals concluded that the race-based Montana hunting regulation is at least rationally related to "legitimate governmental purposes." Pet. at 3. However, the state was unable to cite to any federal statute authorizing them to provide such a preference. Nonetheless, the court below assumed that as long as the classification is based on membership in federally recognized Indian tribes, the classification is "political, rather than racial, and thus subject to rational basis review." Pet. at 2. Thus, the court of appeals extended *Mancari* to mean that the state and its political subdivisions may carve out a preference for American Indians and American Indian tribal members without specific authorization from Congress. This decision runs afoul of this Court's decisions in both *Mancari* and *Rice v. Cayetano*, 528 U.S. 495 (2000).

Mancari was the first time in which this Court was confronted with an equal protection challenge to a law benefitting American Indians. In *Mancari*,

non-Indian employees of the BIA argued that a BIA employment preference for Indians, authorized by a statute allowing Indian preferences,[6] violated the equal protection component of the Due Process Clause of the Fifth Amendment. This Court's discussion of the equal protection challenge was fairly brief but noted the "unique legal status of Indian tribes under federal law" and the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Mancari*, 417 U.S. at 551. This Court found the special preference was justified because "as members of quasi-sovereign tribal entities," the "lives and activities [of Indians] are governed by the BIA in a unique fashion." *Id.* at 554. This Court concluded: "[T]he legal status of the BIA is truly *sui generis*." *Id.* Moreover, this Court limited its holding to "particular and special" legislation "designed to further Indian self-government." *Id.* at 555.

As long as this Court could characterize the special benefits to Indian Tribes as being extended on a government-to-government basis through acts of Congress, it could distinguish a special preference from suspect classifications that are subject to strict scrutiny. Here, the court of appeals' decision ignored the requirement in *Mancari* that the legislation be tied rationally to Congress' trust responsibility to Indian Tribes. In the present case, there is no evidence of any congressional authorization for the state to treat Indians differently under the Montana hunting regulation. In enacting the regulation, Montana had no federal authorization and the state regulation singling out tribal Indians is constitutionally offensive.

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[6] The BIA was acting pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461, *et seq.*

The state's sole purpose was to preserve wildlife and it was logistically difficult to regulate nontribal members because of varying land ownership patterns. Pet. at 3. Yet, the court of appeals simply extended *Mancari* to uphold the state's actions of creating a preference for "tribal members" only for administrative convenience.

Further, the court of appeals' decision conflicts with *Rice*, 528 U.S. at 520. In *Rice*, this Court declined an invitation to extend *Mancari* to a new and larger dimension. Justice Kennedy explained that *Mancari* turned on quasi-sovereign authority relating to self-governance, which caused this Court to uphold "a federal provision giving employment preferences to persons of tribal ancestry." *Id.* at 518 (citing *Mancari*, 417 U.S. at 553-55). But, distinguishing the facts of *Mancari* from those before it, the Court declared that the legislative preference in *Mancari* was "'designed to further Indian self-government.'" *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555). The Court in *Mancari* "was careful to note, however, that the case was confined to the authority of the BIA, an agency described as '*sui generis*.'" *Id.* (quoting *Mancari*, 417 U.S. at 554).

This Court has never accepted the rationales to promote wildlife and administrative convenience to justify an Indian preference, and to do so would ignore the "limited" nature of the *Mancari* exception and the "racial component" of *Mancari* recognized in *Rice*. This Court said: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all Non-Indian citizens." 528 U.S. at 520. Similarly, "[i]t does not follow from *Mancari* . . . that Congress may authorize a State to establish a . . . scheme that limits

[hunting] to a class of tribal Indians, to the exclusion of all Non-Indian citizens." *Id.* at 497.[7] *Mancari* and *Rice* do not justify giving tribal members a preference simply because it promotes conservation of wildlife and is easier to enforce. Such a rationale would justify laws of all sorts and greatly alter equal protection jurisprudence.

In contrast, without any analysis whatsoever, the court below simply assumed that as long as the regulation classified on the basis of "tribal membership" it was required to apply the *Mancari* "highly differential" rational basis test—nothing more was needed.

By its decision below, the Ninth Circuit "extend[ed] the limited exception of *Mancari* to a new and larger dimension," *Rice*, 528 U.S. at 520, by according the states the same treatment as this Court accorded the BIA (notwithstanding this Court's caution that the BIA is truly *sui generis*, *Mancari*, 417 U.S. at 554), and by applying the language of *Mancari* to all matters tribal notwithstanding this Court's admonition that *Mancari* was limited solely to matters relating to quasi-sovereign authority and self-governance, *Rice*, 528 U.S. at 518, 520).

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[7] The Court of Appeals cited two other decisions to support its rational basis review. Pet. at 2. *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004). Neither of these decisions supports the broad proposition that tribes may be granted any preference.

III

THERE IS CONFUSION AMONG THE LOWER COURTS ON THE CONSTRUCTION OF *MANCARI*'S TEST

There is confusion among the lower courts on the construction and application of the *Mancari* test when the racial classification is aimed at assisting American Indians. In the decision below, the court said that the exemption carved out by the state for "[o]nly tribal members" meets the "highly deferential" rational basis test of *Mancari* simply because it involves American Indian tribes. This was so, according to the court below, even though there is no indication that Congress intended to authorize the states to regulate hunting on non-Indian fee property. The court of appeals did not independently examine whether the exemption was rationally tied to federal authority, but simply deferred to the state because it created a classification based "[o]nly on tribal membership." Pet. at 2-3.

In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit recognized that because the interpretation of the Reindeer Act of 1937, 50 Stat. 900 (Sept. 1, 1937), 25 U.S.C. § 500, *et seq.*, by the Interior Board of Indian Appeals (IBIA) created a racial classification that "pushes the constitutional envelope," the reviewing court was required to conduct its own examination.[8] The Ninth Circuit accepted that there

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[8] The Ninth Circuit declined to defer to the agency's interpretation under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), explaining that when a federal agency's interpretation raises grave and serious constitutional doubts, reviewing courts are required "to scrutinize constitutional objections to a particular

(continued...)

was doubt as to the appropriate standard of constitutional review. It recognized that in *Adarand*, Justice Stevens dissented on several grounds, but objected that the majority's concept of consistency would subject preferences for American Indians or American Indian tribal members to the same scrutiny as invidious discrimination against minorities. *Williams*, 115 F.3d at 665 (citing *Adarand*, 515 U.S. at 244-45 (Stevens, J., dissenting)). The Ninth Circuit speculated that "[i]f Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered." *Id.* at 665.

With these constitutional doubts unresolved, the Ninth Circuit in *Williams* assumed that the *Mancari* doctrine retained some vitality as long as the legislation provides "special treatment [that] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Williams*, 115 F.3d at 663. As explained by the Ninth Circuit:

> [Federal] Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."

Id. (quoting *United States v. Antelope*, 430 U.S. 641 (1977)).

Applying this construction of *Mancari*, the Ninth Circuit in *Williams* found that IBIA's interpretation of the Reindeer Act, as barring all in Alaska who are not

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[8] (...continued)
agency interpretation skeptically." *Williams*, 115 F.3d at 662.

Natives from owning imported reindeer, was wrong. The court reasoned that it provided "a naked preference for Indians unrelated to unique Indian concerns," because it involved a commercial industry "that is not uniquely native." The court found that the special preference "in no way relate[d] to native land, tribal or communal status, or culture." *Williams*, 115 F.3d at 664.

Based upon this construction of *Mancari*, the Ninth Circuit concluded that the Secretary's construction of the Act, albeit "not unreasonable" and otherwise entitled to deference under *Chevron*, raised "constitutional problems [that] are truly 'grave,'" which called judicial "constitutional narrowing" into play. *Id.* The court then adopted what it deemed to be a "less constitutionally troubling construction" of the Act, namely, "as not precluding non-natives in Alaska from owning and importing reindeer." *Id.* at 666.

In sharp contrast to the *Williams* decision, the court below carved out an "[o]nly tribal member" preference for hunting big game on fee land owned by non-Indians for the purpose of conserving wildlife and for administrative convenience. It is a "naked preference for Indians" that favors "tribal members" and discriminates against non-Indians who own fee land. Given the grave constitutional concerns raised by such a troubling regulatory regime, this Court should review the Ninth Circuit's understanding and application of the constitutional principles involved.

Another example of the conflict between *Adarand* and *Mancari* is found in *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2001). There, the California appellate court applied strict scrutiny to the

federal Indian Child Welfare Act, 25 U.S.C. § 1901. The court noted:

> Post-*Adarand* Ninth Circuit Court of Appeals cases have focused on the text of *Mancari*, rather than on the footnote language that characterized the BIA preference as more political than racial, and have limited application of the rational basis test to legislation involving uniquely Indian concerns. (*Dawavendewa v. Salt River Project Agr. Imp.* (9th Cir. 1998) 154 F.3d 1117; *Williams v. Babbitt* (9th Cir. 1997) 115 F.3d 675; *Malabed v. North Slope Borough* (D. Alaska 1999) 42 F. Supp. 2d 927.) We do likewise, and do not find child custody or dependency proceedings to involve uniquely Native American concerns.

92 Cal. App. 4th at 1320-21.

The conflict in the courts over the proper standard of review for an American Indian preference is of pressing national importance that must be—and can only be—resolved by this Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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